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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of

Federal-State Joint Board on Universal Service	)	CC Docket No. 96-45

COMMENTS OF REED SMITH SHAW & McCLAY

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SUMMARY

Section 254 of the Communications Act ("the Act"), as amended by the 1996 Telecommunications Act ("1996 Act"), establishes revised and "evolving" standards for universal service in the United States, and for the funding and administration of mechanisms in support thereof. In considering recommendations of the Joint Federal - State Board for implementation of Section 254, the Commission should be cognizant that the states have no authority to regulate CMRS carriers, either for universal services purposes or otherwise within their jurisdictions.

State regulation of CMRS providers was preempted by the 1993 Budget Reconciliation Act which amended Section 332(c) of the Act to provide for such exemption. Section 332(c)(3) of the Act specifically prohibits states from imposing universal service requirements on CMRS carriers unless their services are a substitute for landline telephone exchange service for a substantial portion of a state. This legislative directive was not affected by passage of the 1996 Act, which expressly recognizes and retains the effectiveness of Section 332(c)(3).

The current common carrier line ("CCL") assessment on inter-exchange carrier charges to accommodate a regulatory cap on the end-user subscriber line charge ("SLC") represents a hidden form of universal service subsidy in violation of Section 254(e) of the Act. The SLC cap should be lifted and a consolidated, possibly flat, SLC charge on local exchange carrier ("LEC") rates should serve as the one form of "explicit" funding source for universal service support mechanisms. In this manner, CCL charges

reflecting universal service subsidy elements need no longer be assessed on inter-exchange rates or added to the rates of wireless providers who interconnect to the end user through LECs.

In any case, wireless services at this time do not meet the definition of universal service in Section 254(c) of the Act, and it would be unequitable to impose on wireless carriers an obligation to contribute to the Federal universal service fund.

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The law firm of Reed Smith Shaw & McClay ("RSSM') hereby submits the following comments in response to the Notice of Proposed Rulemaking ("NPRM")[1] in the above referenced docket. In this proceeding, the Commission seeks guidance from interested parties regarding how to implement the universal service directives of Section 101(a) of the Telecommunications Act of 1996 (the "1996 Act"), which adds a new Section 254, entitled Universal Service, to the Communications Act (the "Act").[2]

In the NPRM, the Commission has established a joint Federal-State Board pursuant to Section 410(c) of the Act.[3] which is to make recommendations to the Commission by November 8, 1996 on the implementation of Sections 214(e) and 254 of

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1 *Federal-State Joint Board on Universal Service,* Notice of Proposed Rulemaking and Order Establishing Joint Board, FCC 96-93, adopted and released March 8, 1996 and amended by Order released April 1, 1996, DA-96-483 (*hereinafter*, "NPRM").

2 47 U.S.C. §254.

3 47 U.S.C. §410(c).

the Act. In accordance with the requirements of Sections 410(a) and (c) of the Act[4] final adoption of rules for implementation of these Sections is reserved to the Commission.

As set forth below, RSSM herein submits that (1) telecommunications service providers operating in the Commercial Mobile Radio Service ("CMRS") are, at this time, exempt from universal service support requirements imposed by the states; (2) federal universal service support mechanisms should be funded solely by means of a charge on the end-user rates of local exchange carriers ("LECs"); and (3) in any case, wireless services should not be subject to federal universal service funding mechanisms under Section 254(d) of the Act.[5]

I. STATES ARE PREEMPTED FROM SUBJECTING CMRS PROVIDERS TO THEIR UNIVERSAL SERVICE STANDARDS AND PROCEDURES

Section 254(f) of the Act reserves to the states the ability to adopt regulations "not inconsistent with the Commission's rules," to preserve and advance universal service within their jurisdictions. Within this confine, and subject to the further condition that the state may not adopt universal service standards which "rely on or burden Federal universal service support mechanisms," telecommunications carriers providing intrastate services may be called upon by the state to support its universal

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4 47 U.S.C. §410(a), (c).

5 47 U.S.C. § 254(d).

service program. The Commission, in the NPRM, states that it will not address Section 254(f) of the Act as it is concerned in this proceeding only with Federal universal support mechanisms.[6]

In paragraphs 116 and 117 of the NPRM, however, the Commission seeks comment on how financial responsibility should be divided between interstate and intrastate telecommunications carriers for the costs associated with universal service support mechanisms authorized in the new provision. RSSM submits that, notwithstanding the Commission's formal demurral to addressing the implementation of Section 254(f), its invitation for comments on the separation of interstate from intrastate cost responsibilities will engage it inevitably in a determination of the scope of state authority regarding universal service issues. It is, therefore, important for the Commission and the Joint Board to be cognizant in this proceeding of the fact that the states lack *any* jurisdiction over CMRS providers for the support of universal service mechanisms.

In the Omnibus Budget Reconciliation Act of 1993, Congress amended Section 332 of the Communications Act to provide that "no State or local government shall have any authority to regulate the entry of or the rates charged by any commercial mobile service.[7] This categorical language removes all state jurisdiction over CMRS

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6 NPRM, ¶ 12.

7 47 U.S.C. § 332(c)(3).

rates. In that same legislation, Congress amended Section 2(b) of the Communications Act to provide that the Budget Reconciliation Act did not extend the Commission's authority in relation to states' retained jurisdiction over intrastate services "[e]except as provided in . . . Section 332."[8] That amendment clarifies that Congress removed from the states jurisdiction over rates and entry for both interstate and intrastate commercial mobile services.

The removal of state authority over CMRS rates stemmed from Congress' recognition that uniform federal policies are necessary to promote the nationwide growth of mobile services. Congress acknowledged that, by their nature, mobile services operate without regard to state jurisdictional boundaries.[9] In that environment, disparate state regulation of commercial mobile services could undermine the development of CMRS competition and the nationwide build-out of a wireless infrastructure. Congress intended for mobile services to be subject to uniform rules,[10] and it logically selected the Commission to exercise plenary and exclusive jurisdiction over intrastate and interstate

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8 47 U.S.C. § 152(b).

9 See H.R. Rep. No. 103-111, 103d Cong., 1st Sess. at 260 (1993) (Congress intended to "foster the growth and development of mobile services that, by their nature, operate without regard to state lines as an integral part of the national telecommunications infrastructure").

10 *Id.* at 259.

CMRS entry and rates.[11] Using that authority, the Commission could "establish a Federal regulatory framework to govern the offering of all commercial mobile services."[12]

In the case of state authority over CMRS carriers relative to universal service issues, Section 332(c)(3) of the Act is specific in ousting the states of a regulatory role. That Section reads in relevant part:

> "Nothing in this subparagraph shall exempt providers of commercial mobile services (where such services are a substitute for land line telephone exchange service for a substantial portion of the communications within such State) from requirements imposed by a State commission on all providers of telecommunications services necessary to ensure the universal availability of telecommunications services at affordable rates."

By negative inference, Section 332(c)(3) of the Act leaves authority in the states to regulate intrastate universal service responsibilities for CMRS carriers providing intrastate services within their jurisdictions only to the extent CMRS services "are a substitute for land line telephone exchange service for a substantial portion of the communications within such State."

At this time, no CMRS providers can be considered to serve as a substitute for landline telephone service for a significant portion of any state. Cellular and personal

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11 *See* H.R. Rep. No. 103-213, 103d Cong., 1st Sess. at 497 (1993) (emphasizing amendment to 47 U.S.C. §152(b) as "clarify[ing] that the Commission has the authority to regulate commercial mobile services").

12 *Id.* at 490.

communications service are not now serving as substitutes for landline telephone service in any state of which RSSM is aware. Indeed, in the case of messaging services, the services are not even comparable to telephone exchange service, which provide real-time, two-way, interactive voice communications. Accordingly, Section 332(c)(3) of the Act does not leave the states with authority to regulate wireless carriers for universal service purposes.[13]

This legislative result is not affected by the 1996 Act. Section 254(f) empowers the states to adopt universal service rules "not inconsistent with" the Commission's own rules, requiring telecommunications carriers that provide intrastate services to contribute to universal service support "in a manner determined by the State...". States' universal service authority in relation to CMRS providers, however, is already specifically delimited by the specific provisions of Section 332(c)(3) discussed above. The general authority recognized for states under section 254(f) regarding universal service principles must yield to the more specific restrictions on that authority laid down in section 332(c)(3) with particular regard to CMRS providers.

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[13] According to this reading of the allocation of universal service responsibilities under the 1996 Act, the Commission can exercise plenary interstate and intrastate authority with regard to CMRS carriers in the establishment of universal service principles and procedures. *See* NPRM, ¶ 119.

Furthermore, Section 254(f) is, by its terms, made applicable only to intrastate services. As has already been noted, CMRS services are, by their nature and as a matter of law, interstate in character.[14]

Additional support for this interpretation is found in new Section 253 of the Act, concerning removal of barriers to entry. Section 253(b) of that provision makes clear that state "requirements necessary to preserve and advance universal service," in a manner consistent with Section 254, are not considered to be barriers to entry. Subsection (e) of the section, however, expressly provides: "Nothing in this section shall affect the application of section 332(c)(3) to commercial mobile service providers."[15] Here, again, the 1996 Act makes clear that the states' general authority to regulate universal service standards within their jurisdictions under both Sections 253 and 254 of the Act must yield to the more specific restriction on the exercise of that authority as regards CMRS carriers found in Section 332(c)(3) of the Act.

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14. The definition of interstate versus intrastate classification as applied to CMRS carriers is being considered by the Commission at this time in the context of the *LEC-CMRS Interconnection Proceeding, Interconnection Between Local Exchange Carriers and Commercial Mobile Service* Providers, CC Docket No. 95-185, Notice of Proposed Rulemaking, released January 11, 1996. That rulemaking will almost certainly be decided prior to the Joint Board's scheduled issuance of its recommendations to the Commission in this proceeding in November of this year. Accordingly, it will not be necessary for the Joint Board to address this issue in its deliberations in this docket.

15 47 U.S.C. § 253(e).

In conclusion, when addressing the issues raised in the NPRM regarding the assignment of responsibility between interstate and intrastate jurisdictions for contributions to fund universal service mechanisms, it is important for the Commission and the Joint Board to recognize the statutory preemption of state governments from imposing such responsibilities on CMRS providers.[16]

II. FEDERAL UNIVERSAL SUPPORT MECHANISMS SHOULD BE FUNDED SOLELY THROUGH CHARGES ON THE END USER RATES OF LECs

In paragraph 117 of the NPRM, the Commission poses the broad question as to whether passage of the 1996 Act should change "existing assumptions" about the sources of universal service support. In paragraph 114, it asks interested parties to address more specifically whether to eliminate or reduce the subscriber loop portion of the interstate carrier common-line ("CCL") per-minute access charge assessed on inter-exchange carriers (and passed on to their customers) as a result, in part, due to a regulatory cap imposed on the LEC subscriber line charge ("SLC"). These questions arise pursuant to the directives in Section 254(d) that all telecommunications carriers shall contribute to Federal universal service support mechanisms on an "equitable and

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[16] For this reason, RSSM also questions the suggestion that state commissions might serve as appropriate administrators for Federal universal service support funds. NPRM, ¶ 130.

nondiscriminatory basis," and in Section 254(e) that support for Federal universal service mechanisms should be "explicit."[17]

RSSM agrees that the current cap on SLC and the resultant level of CCL charges are inconsistent with the 1996 Act's directive that universal service support flows be "explicit." [18] RSSM submits that the directives of Sections 254(d) and (e) would be better served by removing this cap and allowing loop costs to be fully recovered through a consolidated and explicit SLC representing the true cost of usage. The CCL could, in turn, be immediately, or over time, amended to eliminate the LECs' unrecovered allocated loop costs which are currently charged, in this manner, as a hidden form of universal service support. For this reason, such charges should under no circumstances be imposed on any other service providers in the network, either. A single, possibly flat, SLC on LEC rates, which the end users would understand to be a separate universal subsidy surcharge, would be the only such cost imposed in the network.

Because the hidden CCL charge is at this time passed on by inter-exchange carriers to their customers, the net, end result for the user would not be higher charges resulting from universal service support, but more explicit charges. Under this approach, existing universal service support safeguards for designated users of the telephone

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17 *See* NPRM, ¶ 112.

18 NPRM, ¶ 113; *MTS and WATS Market Structure*, Recommended Decision and Order. 2FCC Rcd 2324 (1987).

system, such as Lifeline and Linkup payments, could be retained.[19] These programs represent a salutary method for implementing the new directives for universal service goals on the 1996 Act in that they are explicit, and not hidden, forms of subsidization in support of universal service.

III. IN ANY CASE, WIRELESS SERVICES SHOULD NOT BE SUBJECT TO FEDERAL UNIVERSAL SERVICE FUNDING MECHANISMS

Should the Commission decide against eliminating CCL charges on interexchange and other non-LEC services as a means of avoiding "hidden" subsidization of universal service goals, it should still not call on wireless services to contribute to Federal universal service support mechanisms. Section 254(d) of the Act requires that interstate telecommunications carriers contribute to "specific, predictable and sufficient" Federal universal support mechanisms on an "equitable and nondiscriminatory basis." RSSM submits that it would be inequitable and discriminatory for the Commission to assess a contribution on wireless services.

As explained above, wireless services are not yet either comparable to or a substitute for basic telephone services, in most instances. Landline customers have not, with few, if any, exceptions, replaced their traditional plain old telephone service with cellular or PCS services. Messaging services, in fact, are not even two-way, interactive

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19 *See* NPRM, ¶61.

services akin to traditional plain old telephone service; even the new two-way services contemplated are not interactive, but rather two separate, one-way communications. Because the messaging service by itself does not provide the form of essential, two-way voice communication requirements anticipated in Section 254 of the Act,[20] it would be inappropriate and inequitable to impose a universal service surcharge on such service.

Secondly, because of the specialized nature of messaging service, it is unlikely in the foreseeable future to become substitutable for basic telephone service. As such, messaging providers are unlikely at any time to qualify as "eligible" providers of universal services under Section 214(e) of the Act. In this regard, it would be unequitable to require this class of service providers to contribute to a fund from which they are unlikely ever to draw themselves.

Finally, it is established that messaging providers as a class provide low-cost telecommunications services in a highly competitive environment, leaving them with relatively low profit margins. By assessing these service providers on a basis comparable with higher profit margin carriers, the Commission would effectively impose a larger relative price increase on these carriers which would serve to discriminate against them as a class.[21]

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[20] 47 U.S.C. § 254(c)(1).

[21] It is noted in this regard that the assessment of contributions in support of Telecommunications Relay Service ("TRS") on the basis of gross interstate

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RSSM submits that the inequities and potential for discrimination inherent in the federal universal service scheme described above would be obviated by exempting wireless carriers from the Federal universal service contribution plan. Again, by allowing LEC SLC charges to be established free of current artificial "cap" restraint in place of hidden universal service support mechanisms, and encouraging other, explicit forms of subsidization to continue, the Commission would fulfill its mandate under Section 254 to

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revenues is not a meaningful model to the Commission's analysis of this issue since the formula adopted by the Commission for TRS is based on the language of the Americans With Disabilities Act, not on the differing standards embodied in section 254 of the Act. The Commission's proceeding to determine the contribution formula for TRS did not address universal service standards. *See Telecommunications Relay Services and the Americans with Disabilities Act of 1990*, Third Report and Order, 8 FCC Rcd 5300 (1993). *See also* NPRM, ¶ 122.

avoid inequitable and discriminatory assessments on telecommunication carriers, while encouraging the use of "explicit and sufficient" universal service support mechanisms.

Respectfully submitted,

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